Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MARLIN DAVIS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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54 pp

QUESTIONS PRESENTED

PREFACE Petitioner sought a Certificate of Appealability ("COA") from denial of relief under 28 U.S.C. § 2255. On January 8, 2003 the United States Court of Appeals for the Eleventh Circuit denied a Certificate. Davis filed a motion for reconsideration, which was denied on February 24, 2003.

On February 25th, this Court decided *Miller-El v. Cockrell*, 123 S.Ct. 1029 (2003) which expressly clarified the criteria for COA's. The issues identified in the request for the COA were directly supported by rulings of this Court and several federal appellate courts. Davis promptly filed his Motion for Leave to file a Request for Further Review. The Motion and the Request were returned by the Clerk on the basis that a second Motion for reconsideration was not authorized.

Petitioner Presents Alternative Questions:

Whether this Court should grant certiorari and remand for reconsideration in light of this Court's subsequent decision in Miller-El v. Cockrell.

OR

Whether a COA should have been granted to consider the following issues:

1. *Whether the sentence for conviction under a single-count indictment charging a conspiracy "to distribute controlled substances, that is cocaine, cocaine base (commonly known as crack cocaine) and marijuana" should be based on the controlled substance with the least penalty instead of the substance with the greatest penalty*

2. *Whether ineffective assistance of counsel, by failure to object to the government's pervasive use of Petitioner's*

ethnicity to prove membership in a drug conspiracy, and to prejudice the jury by blaming "Jamaicans" (blacks of Jamaican national origin form the Miami area) of using and exploiting "Americans" (local North Florida blacks as were five of the jurors), violated Petitioner's constitutional rights.

3. *Whether ineffective assistance of counsel, by failure (a) to seek a change of venue, (b) to use the opportunity afforded by the* district court *to conduct a meaningful voir dire of jurors for exposure to newspaper and television reports with extensive reference to Jamaicans and falsely accusing petitioner's brother and sole co-defendant at trial of being a "Drug King" responsible for the well publicized death of a state trooper, and (c) failure to prevent consequence of pretrial publicity from infecting the jury trial proceedings, denied Petitioner's constitutional right to fair trial.*

PARTIES

Marlin Davis

Emerson Davis: Marlin Davis' brother and sole co-defendant at trial has a COA pending in the Eleventh Circuit from the same opinion of the district court denying relief to Marlin Davis.

(both are presently incarcerated)

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The district court denied relief under 28 U.S.C. § 2255 on February 22, 2001, on the basis of the Magistrate's report. In a written opinion, the district court denied rehearing on September 23, 2002. (App. A). The District Judge denied the request for a COA on October 30, 2002 (App. C). Petitioner's Motion for COA was denied by Eleventh Circuit Judges on January 8, 2003, (App. D) and the Motion for Reconsideration was denied on February 24, 2003. (App. E)

JURISDICTION

Petitioner timely filed a Motion for Relief under 28 U.S.C. § 2255 on December 28, 1999 (this Court had denied the Petition for Certiorari from the criminal conviction on January 11, 1999, No. 98-7194). Following the denial of § 2255 relief by the district court, the Petitioner timely filed a Notice of Appeal (App. B) and a Request for COA on October 24, 2002. The District Judge denied the COA on October 30, 2002. (App. C). Petitioner then sought the COA from the Eleventh Circuit. Eleventh Circuit Judges denied the COA on January 8, 2003 (App. D) and the Motion for Reconsideration on February 24, 2003. (App. E). (Based on the February 25th ruling of this Court in *Miller El v. Cockrell*, Petitioner sought Leave to File Request for Further Review on March 11, 2003, which was returned by the Clerk on April 3, 2003, as an unauthorized second request for rehearing. (App. F). This Petition for Certiorari is filed within 90 days of the Eleventh Circuit denial of the COA on February 24, 2003. This Court has jurisdiction under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

Original Criminal Proceeding

Marlin Davis was indicted, convicted, and sentenced under a single count for a multi-drug conspiracy:

> . . . to distribute controlled substances, that is cocaine, cocaine base (commonly known as "crack cocaine") and marijuana in violation of Title XXI of the United States Code § 841(a)(1) and (b)(1)(A)(iii).

Marlin Davis was sentenced to 360 months based upon the controlled substance (crack cocaine) with the highest penalty instead of the controlled substance with the least penalty (marijuana). Emerson Davis, Marlin's brother, and sole co-defendant at trial, was sentenced to life imprisonment on the basis of crack cocaine.

At sentencing, court appointed trial counsel did not object to the Court's sentencing or to the quantity and quality of the drugs involved notwithstanding Marlin Davis' personal on-record request for "how much marijuana," "how much cocaine," "how much crack cocaine." On direct appeal, the government counsel argued that the court appointed trial defense counsel did not properly object to judge's finding on drug quantity at the sentencing hearing.

On the direct appeal, the court-appointed appellate counsel also sought relief for denial of a fair trial because of the extensive use of Jamaican ethnicity to prove membership in a drug conspiracy and the impact of extensive prejudicial pretrial publicity. Newspaper and television reports falsely accused Emerson Davis as a Jamaican "drug king" responsible for the death of a state trooper. The government made extensive reference to "Jamaicans" (blacks

of Jamaican national origin) using "Americans" (local North Florida blacks as were five of the jurors) to show membership in the alleged conspiracy and to prejudice the right to a fair trial. Government on appeal argued trial counsel had not made an objection at trial to the use of "Jamaicans." The Eleventh Circuit affirmed without an opinion under Rule 36.1. This Court denied the Petition for Certiorari.

28 U.S.C. § 2255 Proceeding

Marlin Davis' § 2255 Motion for Relief asserted five grounds that include the issues subsequently requested in the COA. An amendment was filed to raise *Apprendi* issues. The magistrate directed the Government to respond, but did not grant the hearing requested by Davis. Davis filed an objection to magistrate's report, and also filed additional memorandum and briefs before the district court. The district court denied all relief based upon the Magistrate's order without further explanation. Davis requested a rehearing predicated upon sentencing and fair trial issues including ethnicity and the impact at trial of prejudicial pre-trial publicity.

The district court granted Davis' request to file supplemental authority from the Eleventh Circuit, *United States v. Allen*, 302 F.3d 1260 (11th Cir. 2002). *Allen* ruled that an indictment and conviction for a multi-drug conspiracy involving cocaine and marijuana was ambiguous under the record and required the sentence be based upon the substance with the least penalty. Davis had filed a Motion for a sentencing hearing that was also pending before the district court.

The district court in a written opinion ruled the conviction of Marlin Davis and Emerson Davis (Marlin's brother and sole co-defendant) for conspiracy to distribute controlled substances involving cocaine, crack cocaine, and

marijuana was not ambiguous. The court determined that the jury necessarily had found with reference to all three objects of the conspiracy and not just to one, or a combination of one of more controlled substances. As the court acknowledged, special interrogatories had not been submitted to the jury. The jury was not instructed that to be guilty of the conspiracy to distribute controlled substances, they must find guilt for all three substances. Based upon the Magistrate's prior report, the district court further ruled that the extensive use of ethnicity was for identification purposes notwithstanding identity of the defendants was not the issue at trial. The district court also ruled the failure to protect the trial from the impact of prejudicial publicity did not warrant relief.

Davis filed a Notice of Appeal and requested the COA. The District Judge denied the COA and the Eleventh Circuit judges denied the request to issue the COA. The denial in the Eleventh Circuit of the Motion for Reconsideration occurred on February 24, 2003. On February 25th this Court decided *Miller-El v. Cockrell* concerning criteria for COA. Davis promptly filed a Motion for Leave to file a request for further consideration in light of *Miller-El,* which was received by the clerk's office on March 11, 2003, and returned by the clerk as unauthorized on April 3 , 2003.

Emerson Davis, Marlin's brother and co-defendant, also had sought relief under § 2255 involving substantially the same issues. Emerson Davis' COA is pending before the Eleventh Circuit from the same opinion of the district court that denied relief to Petitioner.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. MARLIN DAVIS' COA SHOULD BE GRANTED UNDER *MILLER-EL V. COCKRELL*

There are several compelling reasons of substantial public importance why certiorari should be granted. As this Court recognized in *Miller-El v. Cockrell,* the criteria for granting COA's affects constitutional rights of thousands of persons. In particular, the constitutional right of effective assistance of counsel can best, and generally only, be protected under § 2255 relief. The COA's sentencing issue for multi-object conspiracy involve confusion and conflict among the circuits concerning general verdicts without specific jury findings. Depending upon the Circuit, substantial numbers of persons are granted relief and substantial numbers are denied relief predicated on subjective judicial determination of what the jury general verdict really meant and may not have meant. The COA issue considering ethnicity has been consistently recognized by this Court to be of great significance. The obligation of federal courts to "eradicate racial prejudice" in compliance with this Court's proclamation in *Batson v. Kentucky,* 476 U.S. 79 (1986), is frustrated and thwarted without the issuance of COA's.

Miller-El v. Cockrell, 123 S.Ct. 1029 (2003), focuses upon whether the constitutional issues are "debatable," and not upon whether there is a reasonable probability of success or failure if the COA would be allowed.

> The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to the district court's application of AEDPA to petitioner's constitutional claims and ask whether that

> resolution was *debatable amongst jurists of reason*. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction. [Emphasis added.]

Miller-El, at 1039.

Marlin Davis will discuss the application of *Miller-El v. Cockrell* to the constitutional principles in support of the specific issues requested for the COA under two principal sections: (a) sentencing and (b) ethnicity, pretrial publicity, and fair trial.

II. MARLIN DAVIS SHOULD HAVE BEEN SENTENCED FOR THE CONTROLLED SUBSTANCE WITH LEAST PENALTY AND NOT THE HIGHEST

COA issues on sentencing can be stated thusly:

> Whether under a single count indictment and conviction for a drug "conspiracy" to distribute "cocaine, cocaine base (crack), and marijuana" should be sentenced for the substance with the least penalty in the absence of special verdicts or instructions requiring the jury to find guilt on all three substances or acquit.

Marlin Davis was indicted, convicted and sentenced to thirty years under a single count indictment:

> [T]o distribute controlled substances, that is cocaine, cocaine base (commonly known as "crack cocaine"), and marijuana, in violation of Title 21, United States Code, Section 841(a)(1), and (b)(1)(A)(iii).

This Court in *Edwards v. United States*, 523 U.S. 515 (1998) addressed the sentencing question for a conviction of drug crimes involving "cocaine and cocaine base". The instruction had used the disjunctive "or". This Court expressly observed, "a maximum sentence set by statute trumps a higher sentence set forth in the guidelines." *Edwards*, 523 U.S. at 515. In *Edwards*, this Court denied relief because the sentence did not exceed the penalty for the quantity of the drugs for substance with the least penalty.

The district court's denial of § 2255 relief was predicated on the indictment being in the conjunctive (use of "and" to link the controlled substances) and not in the disjunctive (use of "or"). Based upon a general verdict to a multi-drug indictment using "and" the Second Circuit in *United States v. Zillgitt*, 286 F. 3d 128, 131 (2002), held:

> . . . Zillgitt argues that his sentence is unconstitutional under *United States v. Barnes*, . . . in which we held that where a jury returns a general guilty verdict on a single count of conspiracy involving multiple controlled substances, the district court must sentence the defendant as if convicted of a conspiracy involving only the substance that carries the lowest statutory sentencing range. . . . We agree that Zillgitt's sentence was unconstitutional under *Barnes* and the cases upon which *Barnes* relied.
>
> Because Zillgitt did not raise these arguments either at trial or at sentencing, we

> review his claims for plain error. . . . Applying plain error review, we hold that the district court committed error, that the error was plain, that the error affected Zillgitt's substantial rights, and that the error seriously affected the fairness and the public reputation of the judicial proceedings.

The issues raised by Davis concerning sentencing constitute plain error. The constitutional sentencing issue has been raised properly by Marlin Davis in his § 2255 proceeding because the court appointed trial counsel failed to object at the time of sentencing.[1]

The district court's ruling is directly contrary to the Second Circuit's holding in *United States v. Zilliget*, 286 F. 3d 128 (2002) . Although decisions of the Second Circuit are not controlling in the Eleventh Circuit, that decision does prove the COA issue is debatable under *Miller-El v. Cockrell.*

> Under the controlling standard, a petitioner must "sho[w] that reasonable jurists

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[1] On direct appeal of his original conviction the government argued that court appointed counsel did not object to the district court's findings or rulings at sentencing:

> Since he did not object to the amount set out in the PSR and did not challenge that amount during sentencing, he should not be allowed to raise it now for the first time. (Doc. 1384, Government's Brief, no. 96-2879, p. 44).

Marlin Davis's counsel had objected to the PSI concerning 1.5 kilos of crack cocaine, but not to any of the court's rulings and did not request or raise the issue of whether Marlin Davis should be sentenced for the drug with the least penalty at any time. The constitutional right to effective counsel at trial and at sentencing is well established and recognized. See e.g., *Strickland v. Washington*, 466 U.S. 668 (1984); *Glover v. United States*, 531 U.S. 198 (2001); and *Bell v. Cone*, 535 U.S. 685 (2002).

> could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.' " 529 U.S., at 484, 120 S.Ct. 1595 (quoting *Barefoot, supra,* at 893, n. 4, 103 S.Ct. 3383).

Miller-El, at 1039.

The Tenth Circuit in discussing the disjunctive vis-à-vis the conjunctive previously had entered into the debate on the side that it makes no difference:

> First, the court noted that the conspiracy count did not "refer to the five substantive offenses in the disjunctive." *Id.* at 506. This suggests that, because the allegations in the § 846 count conjunctively include all the potential illegal objectives of the conspiracy, the general conviction entails a finding of guilt as to every objective alleged. Under that reasoning, a jury could not convict a defendant of any conspiracy offense unless every alleged illegal objective of the conspiracy were proven. It is well settled that when an indictment charges a conspiracy to violate more than one statute, the jury may find the defendant guilty if it believes beyond a reasonable doubt that the defendant conspired to violate any one of the cited statutes.

Newman v. United States, 817 F. 2d 635, 638 (10th Cir. 1987).

The Tenth Circuit view was rejected by the Sixth Circuit in *United States v. Neuhausser*, 241 F.3d 460, 471 (6th Cir. 2001). The Sixth Circuit considered the use of the

disjunctive or conjunctive to be critical. The district court relied upon *Neuhausser*.

The Circuit Courts, including the Eleventh Circuit, that have addressed the issue both before and after the Supreme Court's decision in *Edwards v. United States*, 523 U.S. 511 (1998), have ruled the sentence must be based on the controlled substance imposing the least penalty. Prior to *Neuhausser*, the Sixth Circuit in *United States v. Dale*, 178 F.3d 429, 432 (6th Cir. 1999), summed up the case authority:

> Seven of the eight circuits that have directly considered this issue have decided that the punishment imposed cannot exceed the shortest maximum penalty authorized in the statutes criminalizing the multiple objects if the punishment authorized by the conspiracy statute depends on the punishment provided for the substantive offenses which were the objects of the conspiracy. That is the case here. The maximum sentence for conspiring to distribute a controlled substance depends on the controlled substance to be distributed. 21 U.S.C. § 846. Given the facts in this case, the maximum sentence for a conspiracy to distribute marijuana is five years, 21 U.S.C. § 841(b)(1)(D), while a conspiracy to distribute crack would yield a forty-year maximum sentence, 21 U.S.C. § 841(b)(1)(B).
>
> Five courts of appeals have held that when the jury returns a general verdict to a charge that a conspiratorial agreement covered multiple drugs, the defendant must be sentenced as if he distributed only the drug carrying the lower penalty. [footnotes omitted]

The Eleventh Circuit in *United States v. Riley*, 142 F.2d 1254, 1256 (1998), opined its interpretation of *Edwards*:

> The [Supreme] Court stated only two exceptions to this rule. First, if the amount of one substance involved leads to a lower statutory maximum sentence than would apply to the amount of the other substance, compare 21 U.S.C. § 841(b)(1)(A) with id. § 841(b)(1)(B), then the district court must stay below the lower statutory maximum. See *Edwards*, — U.S. at —, 118 S.Ct. at 1477. But here, both Riley and Cleveland generously exceeded the amounts required to make them eligible for life sentences under § 841(a)(1)(A), whether they are sentenced solely for crack or solely for powder. Second, a lower sentence may be warranted if the conduct involving one of the drugs is not "relevant conduct" under the Guidelines—that is, not part of the same "course of conduct or common scheme or plan as the offense of conviction."

In another recent case which involved an indictment using the disjunctive "or" the Fourth Circuit ruled the sentence must be based on the substance with the least penalty. The court commented:

> The Government did not request a special verdict form, as was its obligation. See *Barnes*, 158 F.3d at 672 ("[I]t is 'the government's responsibility to seek special verdicts.'"). With these general verdicts, it is thus impossible to determine on which statutory object or objects—sale of heroin, cocaine, cocaine base, or marijuana—the conspiracy conviction was based.

United States v. Rhynes, 206 F.3d 349, 380 (4th Cir. 1999).

In granting relief, the court in *Rhynes* did not discuss whether a multiple object conspiracy indictment that linked the controlled substances with "and" instead of "or" would be entitled to relief. Other courts, however, including the Fifth and Sixth Circuits, have considered the express use of the disjunctive "or" in either the indictment or in the instructions to be absolutely critical. Although, this exception or interpretation had not been recognized in *Edwards* which involved the conjunction "and", this was the express basis for the district court ruling from which Davis sought the COA.

> Given their instructions, the jury determined that Davis was guilty "as charged in the indictment." Unlike the ambiguous verdicts in *Allen, Dale,* and *Rhynes*, the jury's verdict here was unambiguous, indicating that Davis was found guilty of conspiring to distribute and to possess with the intent to distribute cocaine, cocaine base, and marijuana. Moreover, on appeal, the evidence was found sufficient to support that verdict. Under the circumstances, Davis's sentence did not have to be limited to the maximum allowable for an indeterminate amount of marijuana, and Davis's counsel was not ineffective for failing to argue that it did. See, e.g., United States v. Neuhausser, 241 F.3d 460, 468 (6th Cir.)(holding that, where the indictment charged the defendants with conspiring to distribute both marijuana and cocaine and where the jury was instructed in accordance with that charge, Dale was not controlling and the defendant's sentence did not need to be limited to the maximum allowable for an indeterminate amount of

marijuana), cert. denied, 122 S.Ct. 181 (2001); United States v. Green, 180 F.3d 216 (5th Cir.)(finding no ambiguity in the jury's general verdict as to a multi-substance conspiracy, and no need to limit the defendant's sentence to the substance carrying the lowest statutory penalty, where the indictment charged a conspiracy to distribute both cocaine and preludes, where the jury instructions repeatedly used the word "and" to describe the controlled substances that were the object of the conspiracy, and where the jury was at no time instructed that it could convict upon a finding of cocaine or preludes), cert. denied, 528 U.S. 1054, 120 S. Ct. 599, 145 L.Ed.2d 497 (1999).

Appendix A-6

In fact, the very ruling of the district court demonstrates that its distinction of decisions by this Court, and other courts is debatable. In *United States v. Allen*, relief was granted for conviction under an indictment involving controlled substances linked by "and". Under the jury instructions the court considered the verdict to be ambiguous.

The Davis jury, as was true of the *Allen* jury, the *Zillgitt* jury, and those in the other referenced cases, returned a general verdict.[2] The jury was *not* charged that Marlin Davis could be found guilty on the conspiracy count *only if*

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[2] *See United States v. Barnes*, 158 F.3d 662, 672 (2d Cir. 1998), (government responsibility to seek special verdicts- with this general verdict, it is thus impossible to determine...). The Eleventh Circuit has cited *Barnes* "as persuasive authority." *Allen*, 302 F.3d at 1275; See *United States v. Rhynes*, 206 F.3d 349, 380 (4th Cir. 1999), (it is the government's responsibility to seek special verdict).

Marlin Davis agreed to participate with each and all three controlled substances: cocaine, crack cocaine, and marijuana. The court in *Davis* did not instruct nor did the parties argue to the jury that a failure of proof of a conspiracy as to any one of the three controlled substances, be it cocaine, cocaine base, or marijuana, would require an acquittal on Count I.

The *Davis* case focused on "drugs" and "dope" as "controlled substances." The jury was instructed it was a crime "to distribute a controlled substance" (emphasis added):

> In Count I, the defendants are charged with conspiring to distribute and to possess with the intent to distribute controlled substances, specifically cocaine, cocaine base, and marijuana.
>
> Title 21, United States Code, Section 846 makes it a separate federal crime or offense for anyone to conspire or agree with someone else to do something, which, if actually carried out, would be a violation of Section 841(a)(1). Section 841(a)(1) makes it a crime for anyone to knowingly distribute or to possess with the intent to distribute **a controlled substance**. (emphasis added).

The trial testimony of government witnesses and questions and arguments by government counsel referenced "drugs" and "dope" more than any particular controlled substance. "A controlled substance", is singular and would be satisfied by a conspiracy involving any three of the controlled substances. "Drugs", and "dope" are ambiguous as they could mean either cocaine, cocaine substance, or marijuana, or some combination thereof. Because the jury was told they could convict for a conspiracy involving "a controlled substance" and not told they must convict on all

three controlled substances or acquit, the verdict is ambiguous.

In *United States v. Pace*, 981 F.2d 1123, 1129 (10th Cir 1992), the Tenth Circuit recognized that the terms "dope" or "drugs" are ambiguous and create an unclear reference to multiple substances that could be involved in the conspiracy:

> The transcript, however, also includes approximately thirty references to "dope or "drugs", which might refer to either drug. There were few references to both drugs, including that certain chemicals are "precursors that are used to manufacture amphetamine and methamphetamine..."

In the Davis case, there were over a hundred references to "drugs" or "dope". The use of "dope" or "drugs" sometimes referred to one controlled substance and at other times two or more controlled substances.

The record of the sentencing of Marlin Davis establishes the confusion and ambiguity of whether the verdict was based upon a finding of all three or a combination of one or more controlled substances at the sentencing hearing. The Defendant personally attempted to find out.

> Your Honor, you're going to send somebody to prison for the rest of his life from what approximately seven people said. I mean, at least they can do is at least tell me how much powder cocaine I'm charged with, how much crack cocaine I'm charged with, and how much marijuana I'm charged with.

THE COURT: All right, sir. Anything else?

MR. GLAZER: No.

* * *

THE COURT: . . . But he was involved in the crimes for which he was indicted and for which he was convicted; and, that is, dealing in this crack cocaine, and that's what he's being sentenced for.

I don't know how much clearer I can be on the record, but that's the basis of this sentencing.

Marlin Davis was found guilty of "a drug conspiracy" involving "a controlled substance." The individual jurors all could have found "a drug conspiracy" with each juror finding a different controlled substance or a different combination of controlled substances. For the district court to hold that the Davis jury could not have done so violates due process under the Sixth Amendment. U.S. CONST. Amend. VI.

Under *Miller-El*, the COA should have been granted. The issue is certainly debatable as shown by the conflicts among the circuits.

III. ETHNICITY - PRETRIAL PUBLICITY - *VOIR DIRE*

The COA involving debatable constitutional questions of ethnicity, pretrial publicity, and fair trial can be stated thusly:

Whether ineffective assistance of counsel in failing to object to pervasive use of

"Jamaican(s)" by the government to prove membership in a drug conspiracy and not for purpose of physical identification of unknown persons and used by the government to prejudice the jury by blaming "Jamaican(s)" (blacks from Miami area of Jamaican national origin) using and exploiting "Americans" (local North Florida blacks, as were five of the jurors), violated Petitioner's constititutional rights.

Whether ineffective assistance of counsel, by failure to seek a change of venue, and by failure to use the opportunity afforded by the district court to conduct a meaningful *voir dire* of jurors for exposure to newspaper and television, and by failure to prevent consequence of pretrial publicity from infecting the jury trial, denied Petitioner's constitutional right to fair trial.

For decades, this Court has consistently protected the constitutional rights of criminal defendants against racially based uses of ethnicity in an affirmative effort to eradicate racial bias from the criminal justice system. *McClesky v. Kemp*, 481 U.S. 279, 309 (1987) ("[T]he jury is a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.'"); *Batson v. Kentucky*, 476 U.S. 79, 85 (1986) ("We have engaged in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system."); *Rose v. Mitchell*, 443 U.S. 545, 555, (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.")

The denial of the COA does not "eradicate racial bias." Instead, it conceals bias and thereby nurtures its growth. The only way racism can be eradicated is to expose

it to the bright light of appellate review. This Court needs to grant certiorari to provide this light.

Marlin Davis's right to a fair trial was prejudiced by the defense counsel's failure to object to the prosecution's abuse of the ethnicity of the defendants that had been compounded by false pre-trial publicity accusing Emerson Davis (Marlin Davis's brother and sole co-defendant at trial) of being responsible for the death of the state trooper. On the initial criminal conviction appeal, the government acknowledges the ineffective assistance of the defense counsel and expressly blamed court-appointed defense counsel for their failure to object and for their reference to Jamaicans:

> Further, neither defendant objected to the prosecutor's use of the word Jamaican and in fact on cross examination, made more references to Jamaicans than did the government on direct examination. Taken in the context of the entire trial, it cannot be said either that the comments were improper or that they prejudicially affected the defendant's substantial rights. Further, by failing to object the defendants waived their right to raise this issue on appeal. United States v. Nyhuis, 8 F.3d 731, 743 (11th Cir. 1993), cert. denied, 115 S.Ct. 56 (1994).

Doc. 1384, Government's Brief, No. *96-2879, Eleventh Circuit, at 20.*

Contrary to the government's statement, the record establishes the government made far more references to Jamaicans and for the purpose of showing membership in the conspiracy. Marlin Davis' court appointed trial counsel made only one reference. This is of no moment. We would suggest and believe this Court agrees, that everyone

including the judge, the prosecutors, and the defense counsel all have a duty to avoid and eradicate use of racism, national origin, and ethnicity from all federal trials. See, e.g., *Batson v. Kentucky*, 476 U.S. 79 (1986); see also *Doe v. United States*, 903 F.2d 16 (D.C. Cir. 1990).

The Eleventh Circuit in the prior criminal appeal did not address the ethnicity issue in its Rule 36-1 affirmation without opinion. The Eleventh Circuit has held effective assistance of counsel should not be raised on direct appeal. *United States v. Arango*, 853 F.2d 818, 823 (11th Cir. 1988) and *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000). This Court on April 23, 2003, ruled the ineffective counsel issue did not have to be raised on the direct appeal. *Massaro v. United States*, 123 S.Ct. 1690 (2003).

The "Jamaican" identity tag had two purposes: to prejudice the jury against the Jamaican defendants (Marlin Davis and his brother Emerson Davis) in light of false pretrial publicity and to prove guilt on the basis of national origin. The following four partial excerpts are from direct and re-direct of government witnesses by the prosecutor:

> Q: Okay did any of the other people of **Jamaican** descent who were up in the Garden you already testified about who were selling drugs up there, did any of them ever bring money into your house as well?
>
> A: Yes, if I'm not mistaken I think Jubee and Bounty.

Washington - Direct, Doc. 1108-6 (emphasis added).

> Q: Was there any drug dealing in the Marianna Gardens Apartments before the **Jamaicans** came?
>
> A: No sir, not that I know of.

Bailey - Redirect, Doc. 1108-194 (emphasis added).

> Q: All right. And do you know whether any of—any others are of **Jamaican** descent?
>
> A: Yes.
>
> Q: Do you know whether or not any of those people of **Jamaican** descent have been charged in federal court?
>
> A: All of them. I think most of them.

Jenkins - Redirect, Doc. 1108-243 (emphasis added).

The Magistrate without conducting a hearing ruled that Marlin Davis' § 2255 Motion was not procedurally barred but considered the references to "Jamaicans" general and merely to identify the defendants: "None of these references to ethnicity that have been cited by the Defendant are references to anything but identity." The Davis request for a hearing in the district court was also denied.

There is a constitutional difference between using color or race to physically identify an individual otherwise unknown and using color or race to identify the members of a conspiracy. Here Jamaican was the litmus test for proving membership in the charged drug conspiracy. The physical identity argument borders on being outright specious. There was not an identity issue of unknown persons—all of the witnesses who identified and testified against Marlin Davis or Emerson Davis personally knew who they were. This was not a rape victim describing an unknown attacker or a wanted bulletin physically describing a fugitive for identification by strangers.

Ethnicity was pervasively and persuasively used from the beginning to the end of the trial. Record excerpts of

the ethnicity in the trial total 22 pages. (Marlin Davis' Motion for Relief Under 28 U.S.C. § 2255, App. A)

From *voir dire* to closing arguments the government's very successful theme was bad "Jamaicans" who brought "misery" to North Florida and corrupted the "Americans" to do their dirty work. The Jamaicans were blacks from the Miami area. The Americans were also blacks. Under the record, the differentiation was made to improperly prove Jamaicans, such as Marlin Davis, were drug dealers and co-conspirators. The good "Americans" who had been "used" by the bad "Jamaicans" were local North Florida blacks or African-Americans—as were five of the jurors. Outside the presence of the jury, the following comment was made by the prosecutor.

THE COURT: Anything else?

> MR. KIRWIN: Judge, yes. Everyone danced around this record, Judge, but - I mean danced around this question, but I think for the record, or the record should reflect that there are five black Americans on this jury and that the United States of America did not issue a challenge to a single black American during the course of this jury selection process. There is a sixth black American who is one of the - alternate jurors, and the United States of American did not issue a single challenge against any black American that is seated as an alternate juror as well.

Mr. Kirwin, Doc.1108-157 (emphasis added).

The "Jamaican" versus "American" theme was invidious and effective. The following are excerpts from questions by the prosecutor:

Q: Now is Jubee an **American** or is **Jubee** a Jamaican?

A: As far as I know, he's **Jamaican**.

Matthews - Redirect, Doc. 1120-75 (emphasis added).

Q: Did Michael or Buddy, or whatever his name was, the person in that photograph there, did he have any **Americans** working for him up there in the Marianna Garden Apartments?

Matthews - Redirect, Doc. 1120-85 [Emphasis added].

Any doubt the Government utilized ethnicity "Jamaicans" versus "Americans" to prejudice the jury in violation of the constitution was removed by the Prosecutor's closing jury argument. After discussing activities of certain individuals identified as Jamaicans during the course of the trial, the Prosecutor summed things up as follows:

And what do they all do up there? Sell crack cocaine. Who do they use? Runners. The **Americans** up there sold for them.

Doc. 1112-25 [Emphasis added].

The District of Columbia upheld plain-error where the use of Jamaican ethnicity was far less pervasive than the 22-page excerpt from this trial.

But plain-error review is entirely appropriate when the matter complained of "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings,"

> and that, we think, was plainly the case here. Use of ethnicity and national origin to prove guilt rises to constitutional dimension and is plain error. [Footnotes omitted].

United States v. Doe, 903 F.2d 16, 26 (D.C.Cir.1990).

The extensive use of ethnicity was plain error, directly affected Davis's substantial rights, and seriously affected the fairness and public reputation of the judicial proceedings. The use of ethnicity was prejudicial, particularly in the context of this trial and the pre-trial publicity. This pretrial publicity included explicit representations of fact that were false. Excerpts from the transcript relating to ethnicity and excerpts from the Tallahassee Democrat relating to pretrial publicity and the "Jamaican connection" were filed with the district court. *See* App. A and B attached to Marlin Davis' § 2255. Television and newspaper headlines featured the apprehension of Emerson Davis, falsely depicting him as the Jamaican gang leader responsible for the death of the state trooper, James Fulford (who at a routine traffic violation stop searched a microwave oven, intended for someone else, that exploded upon opening).

Testimony by a deputy United States Marshall at the hearing granted for Emerson Davis (Marlin Davis was not granted a hearing) further confirmed the presence of trooper James Fulford's family members at the criminal trial. The family members arrived at and departed from the courthouse in a marked highway patrol car. See Hearing on Emerson Davis § 2255 Motion Transcript Vol. 2, April 13, 2001 and Marlin Davis's Supplemental Memorandum Document 1505 and 1506.

As counsel for Marlin Davis previously has stated in documents filed in the district court, the trooper's family had every right to attend the trial and certainly every right to be

accommodated by the Florida Highway Patrol and any other citizen. The grief of the trooper's family needed closure and needed to be respected. They were the tragic victims of a crime that had been perpetrated by the Howell brothers (not the Davis brothers) whose "Jamaican" heritage was a well publicized element of the emotionally charged environment surrounding the trials.

The importance of the trooper's family being at the trial is not that it occurred, the importance is everyone knew it would occur. It had been extensively reported that the trooper's family members had attended both the state murder trials which had been moved from Monticello because of extensive pretrial publicity and the prior federal trial in Tallahassee.

There was no need for the government to remind jurors of the trooper's death. In arriving and departing the courthouse each morning and evening of the trial, the jury could not help but notice a state highway patrol car prominently parked. And no juror would think the trooper's family was present by mere coincidence or happenstance.

Defense counsel did not seek any instruction, charge or help from the court that Davis was not responsible and or involved or anything to protect the proceedings from improper prejudice. Only after the jury trial at the sentencing hearing did the district court and the prosecutor acknowledge that the Davis brothers were not involved in the trooper's death.

> MR. KIRWIN: No, sir, other than they haven't been charged with Trooper Fulford's homicide. It wasn't mentioned to the jury at any time during the course of the trial. We agreed not to bring it up.

> THE COURT: That was not an issue in this trial at all . . . . I don't think that there is any evidence that he was directly involved in this trooper's death. The government has not sought to lay that upon his shoulders. The Court does not see that he was involved in that murder

There was neither a change of venue motion filed by defense counsel nor a constitutionally adequate *voir dire*. The *voir dire* was akin to "don't ask, don't tell." Effective *voir dire* under known circumstances was an essential requirement, not an optional tactic. If there was ever prejudicial error for failing to *voir dire*, this is the case. See *Cummings v. Dugger*, 862 F.2d 1504 (11th Cir. 1989); United *States v. Davis*, 583 F.2d 190 (5th Cir. 1978). See also *United States v. Beckner*, 69 F.3d 1290, 1291 (5th 1995) ("A defendant's right to an impartial jury includes the right to an adequate *voir dire* to identify unqualified jurors" citing *Morgan v. Illinois*, 504 U.S. 719, 729 (1992)).

WHEREFORE, under *Miller-El v. Cockrell*, Marlin Davis has demonstrated the threshold question that the constitutional issues, properly raised, are debatable among reasoned jurists. The COA should have been granted. This Court should grant certiorari.

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Appendix A

Order Denying Defendant's Motions For Rehearing And Resentencing, September 23, 2001

Appendix A

[Filed September 23, 2001 and docketed September 24, 2001]

IN THE UNITED STATES DISTRICT COURT FOR THE NOTHERN DISTRICT OF FLORIDA TALLAHASSE DIVISION

UNITED STATES OF AMERICA

v. 4:29cr4013

MARLIN DAVIS,

Defendant.

ORDER DENYING DEFENDANT'S MOTIONS FOR REHEARING AND RESENTENCING

Before the court are Marlin Davis's motions for rehearing (doc. 1462) and for resentencing (doc. 1536). The government has not responded to either motion. Because the court finds no merit to either motion, they will be denied.

I.

Davis was charged in a superseding indictment with one count of conspiracy to distribute and to possess with the intent to distribute "cocaine, cocaine base (commonly known as "crack cocaine"), and marijuana." Doc. 848 at 2 (emphasis added). The jurors were instructed that Davis was "charged with conspiring to distribute, and to possess with the intent to distribute cocaine, cocaine base (commonly known as crack cocaine), and marijuana." Doc. 976 at 13

(emphasis added). The jurors were also told that, to find Davis guilty of the conspiracy, they must unanimously find beyond a reasonable doubt "[t]hat two or more persons in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment." Doc. 976 at 12 (emphasis added). On their verdict form, the jurors indicated that they found Davis guilty "as charged in the indictment." Doc. 978. The jurors were not instructed that they could find Davis guilty if they found that he conspired to distribute and to possess with the intent to distribute cocaine, or cocaine base, or marijuana.

Davis was sentenced to a term of 360 months in prison. The sentence was within the maximum statutory limits applicable to a cocaine or a cocaine base conspiracy but exceeded the maximum sentence for a conspiracy to distribute marijuana. At sentencing, while objecting to the quantity of drugs that was attributed to Davis, doc. 1073 at 3-4, defense counsel suggested that "there was no marijuana in this case." Doc. 1073 at 9.

Davis appealed his conviction and sentence, challenging—among other things—the sufficiency of the evidence to convict on the charged conspiracy. Doc. 1384 at 40. Davis conviction and sentence were affirmed on appeal to the United States Court of Appeals for the Eleventh Circuit, doc. 1252, and the United States Supreme Court denied *certiorari*. Doc. 1282.

On a motion for relief under 28 U.S.C. §2255, as supplemented, docs. 1325 & 1395, Davis raised a number of claims, including sentencing claims under Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt") and Edwards v. United States, 523 U.S. 511, 118 S. Ct. 1475, 140 L. Ed. 2d 703 (1998) (holding that, where the government

charged the petitioners with conspiring to possess with intent to distribute cocaine and cocaine base but the district court instructed the jury that the government must prove that the conspiracy involved measurable amounts of cocaine or cocaine base, the judge was authorized to determine for sentencing purposes whether crack, as well as cocaine, was involved in the conspiracy). The magistrate judge recommended (doc. 1439) that the court deny Davis's section 2255 motion in its entirety, and this court adopted (doc. 1458) that recommendation. The clerk entered judgment (doc. 1459) on February 22, 2001, and Davis filed his motion for rehearing on March 8, 2001.

II.

Among other things, Davis suggests that, because he was charged with a multi-drug conspiracy, and because the jury returned a general verdict without a specific findings as to the type of drug(s) involved, his sentence should not have exceeded the maximum sentence (five years) for a conspiracy to distribute, and to possess with the intent to distribute, an unspecified quantity of marijuana. Davis contends that his lawyer was ineffective not only because he failed to object to the district court's use of crack cocaine as the basis for Davis's sentence but also because he advised the court at sentencing that "there was no marijuana in this case" instead of arguing for a sentence based on marijuana. Doc. 1073 at 9. To support his argument, Davis relies on the Supreme Court's dicta in Edwards v. United States and the Eleventh Circuit's recent decision in United States v. Allen. No. 00-10108, 2002 WL 1932499 (11th Cir. Aug 22, 2002).

In Edwards, a jury returned a general verdict that the defendants had conspired to distribute cocaine or cocaine base. On certiorari to the Supreme Court, the defendants argued that their sentences were unlawful, insofar as they were based on cocaine base, because the Sentencing Guidelines imposed higher penalties for the distribution of cocaine base than for the distribution of cocaine. The Court

rejected the defendants' argument, stating that "[t]he Sentencing Guidelines instruct the judge in a case like this one to determine both the amount and the kind of 'controlled substances' for which a defendant should be held accountable—and then to impose a sentence that varies depending upon amount and kind." Edwards, 253 U.S. at 513-14. The Court noted that the outcome of the case *might* have been different if the District Court's sentence had exceeded the maximum permitted by statute for cocaine-only conspiracy. The court explained:

> Of course, petitioners' statutory and constitutional claims would make a difference if it were possible to argue, say that the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy. That is because a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines...But, as the Government points out, the sentences imposed here were within the statutory limits applicable to a cocaine-only conspiracy, given the quantities of that drug attributed to each petitioner.

Edwards, 523 U.S. at 515.

In Allen, the defendants were charged with conspiracy to distribute cocaine and marijuana. In its instructions to the jury, the district court did not state that a defendant could be found guilty of the charged conspiracy if--and only if--the jury found that the conspiracy involved both cocaine and marijuana. Instead, the word "or" crept into the instructions when the district court advised the jury that it is "a crime for anyone to knowingly possess cocaine or marijuana with the intent to distribute it." Allen, 2002 WL 1932499, at *8. Although the defendants requested a special verdict form, asking the jury whether the defendants were guilty of conspiring to distribute cocaine or conspiring to

distribute marijuana, the district court denied the request and, instead, gave the jury a general verdict form. The jury returned a verdict of guilty on the conspiracy count, and the district court sentenced the defendants using the guidelines for a cocaine conspiracy.

> On direct appeal, the Eleventh Circuit vacated the sentences based on what it called a "Dale-Rhynes violation." Allen, 2002 WL 1932499, at *12. See United States v. Dale, 178 F.3d 429 96th Cir. 1999) (holding that where the jury returned a general verdict on a charge of conspiracy to distribute both marijuana and cocaine, and where it was possible that the jury found only a marijuana conspiracy, the sentence was limited to the maximum penalty for an unspecified quantity of marijuana); United States v. Rhynes, 196 F.3d 207 (4th Cir 1999) (holding that, where there was a general verdict on a count charging a conspiracy to distribute multiple controlled substances, and where the jury was instructed that it could find the defendants guilty if they distributed any of the drugs charged as part of the conspiracy, the district court could not impose a sentence in excess of the statutory maximum for the least-punished object on which the conspiracy could have been based), vacated in part on other grounds, 218 F.3d 310 (4th Cir.), cert, denied, 530 U.S. 1222, 120 S. Ct. 2234, 147 L. Ed. 2d 263 (2000). The Eleventh Circuit wrote:
>
> At no time was the jury advised, either in the court's instructions or in the Government's argument to the jury, that before a charged Defendant could be found guilty of the conspiracy count, it must find that the Defendant had agreed to participate

> with both cocaine and marijuana. Nor did the court instruct or the parties argue to the jury that a failure of proof as to either controlled substance, be it cocaine or marijuana, would require an acquittal on Count I.

Allen, 2002 WL 1932499, at *12. The Eleventh Circuit accordingly remanded the case to the district court with instructions to grant the government the opportunity "to consent to a re-sentencing of the Defendants as to [the conspiracy count] based on maximum sentence of five years or to elect to proceed against one or more of the Defendants with a new trial on [the conspiracy count] with a special verdict." Allen, 2002 WL 1932499, at *13.

Davis's reliance on Edwards and Allen is misplaced. Here, the jurors were instructed that the indictment charged Davis, "with conspiring to distribute, and to possess with the intent to distribute cocaine, cocaine base (commonly known as crack cocaine), and marijuana." Doc. 976 at 13 (emphasis added). The jurors were also told that, to find Davis guilty of the conspiracy, they must unanimously find beyond a reasonable doubt "[t]hat two or more persons in some way or manner, came to a mutual understanding to try and accomplish a common and unlawful plan, as charged in the indictment." Doc. 976 at 12 (emphasis added). Consistent with the instructions, the jurors were asked on the verdict form whether they found Davis guilty or not guilty "as charged in the indictment." At no time were the jurors advised that a verdict of guilt could be based upon a finding that Davis conspired to distribute or to possess with the intent to distribute any of the controlled substances charged.

Given their instructions, the jury determined that Davis was guilty "as charged in the indictment." Unlike the ambiguous verdicts in Allen, Dale, and Rhynes, the jury's verdict here was unambiguous, indicating that Davis was found guilty of conspiring to distribute and to possess with the intent to distribute cocaine, cocaine base, and marijuana.

Moreover, on appeal, the evidence was found sufficient to support that verdict. Under the circumstances, Davis's sentence did not have to be limited to the maximum allowable for an indeterminate amount of marijuana, and Davis's counsel was not ineffective for failing to argue that it did. See, e.g., United States v. Neuhausser, 241 F.3d 460, 468 (6th Cir) (holding that, where the indictment charged the defendants with conspiring to distribute both marijuana and cocaine and where the jury was instructed in accordance with that charge, Dale was not controlling and the defendant's sentence did not need to be limited to the maximum allowable for an indeterminate amount of marijuana), cert. denied, 122 S. Ct. 181 (2001); United States v. Green, 180 F.3d 216 (5th Cir.) (finding no ambiguity in the jury's general verdict as to a multi-substance conspiracy, and no need to limit the defendant's sentence to the substance carrying the lowest statutory penalty, where the indictment charged a conspiracy to distribute both cocaine and preludes, where the jury instructions repeatedly used the word "and" to describe the controlled substances that were the object of the conspiracy, and where the jury was at no time instructed that it could convict upon a finding of cocaine or preludes), cert. denied, 528 U.S. 1054, 120 S. Ct. 599, 145 L. Ed. 2d 497 (1999).

III.

In his motions for rehearing and resentencing, Davis argues that his sentence is invalid under Apprendi v. New Jersey, 530 U.S. at 466, a case decided after Davis's conviction and sentence were affirmed on appeal. Although he has not abandoned or withdrawn his argument that Apprendi should be made retroactive to his case, Davis now concedes that, because the Supreme Court has not made Apprendi retroactive, he is not entitled to relief under Apprendi. Doc. 1561 at 2. See United States v. McCoy, 266 F.3d 1245 (11th Cir. 2001) (holding that Apprendi does not apply retroactively to cases on collateral review and Apprendi-error does not constitute a jurisdictional defect), cert. denied, 122 S. Ct. 2362, 153 L. Ed. 2d 183 (2002).

IV.

Davis argued in his section 2255 motion, and he continues to argue in his motion for resentencing, that his lawyer was ineffective both for failing to seek a change of venue due to pretrial publicity as well as for failing to object to the prosecution's repeated reference to the ethnicity of many of Davis's co-conspirators. After careful consideration, the magistrate judge recommended rejection of Davis's arguments in this regard. This court adopted the magistrate judge's recommendation, thereby rejecting Davis's claims of ineffective assistance based on counsel's failure to seek a change of venue and failure to object to the prosecutor's alleged abuse of the ethnicity issue. On reconsideration, this court continues to find no merit to Davis's ethnicity/pre-trial publicity arguments.

V.

Having found no merit to any of the arguments raised by Davis in his motions for rehearing and resentencing, it is so ORDERED:

Davis's motion for rehearing (doc. 1462) and motion for resentencing (doc. 1536) are DENIED.

DONE AND ORDERED this 23rd day of September 2002.

WILIAM STAFFORD
SENIOR UNITED STATES DISTRICT JUDGE

Appendix B

Order Denying Defendant's Request for Certificate of Appealability, October 30, 2003

Appendix B

[Filed October 24, 2002]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHSSEE DIVISION

UNITED STATES OF AMERICA,

vs. CASE NO: 4:99cv522-WS
(2255 Motion)
4:29cr4013
MARLIN DAVIS, (Prior Criminal Case)

Movant,
_____/

NOTICE OF APPEAL

1. Notice is hereby given that Marlin Davis in the above named case hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the Order and Final Judgment that was entered on February 22, 2001. A timely Petition for Rehearing was filed on March 8, 2002 and was denied by Order and Opinion of the Court dated September 23, 2002 and entered on September 24, 2002.

2. This Notice of Appeal is filed pursuant to Rule 11 of the Rules Governing 28 U.S.C. § 2255 Cases and Rules 4(a) and 22 of the Federal Rules of Appellate Procedure. A request has been filed with the United States District Court

for a Certificate of Appealability pursuant to 28 U.S.C. § 2253.

/s/ William VanDercreek
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Appendix C

Order Denying Defendant's Request for Certificate of Appealability, October 30, 2002

Appendix C

[Filed and Entered October 30, 2002]

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA

vs. 4:92cr4013-WS
4:99cv522-WS

MARLIN DAVIS,

Defendant.

_____/

ORDER

Defendant has filed a notice of appeal, application for certificate of appealability, and supporting memorandum. Docs. 1581-1583. Defendant appeals the denial of his motion to vacate sentence pursuant to 28 U.S.C. § 2255, so a certificate of appealability is required. § 2253 (c)(1)(B); Fed.R.App.P.22(b).

> To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented

were "adequate to deserve encouragement to proceed further."

Slack v. McDaniel, 529 U.S. 473, 483-84, 120 S.Ct. 1595, 1603-04, 146 L.Ed.2d 542 (2000); *quoting*, Barefoot v. Estelle, 463 U.S. 880, 893, n. 4 703 S.Ct. 3383, 3394, n.4, 77 L.Ed.2d 1090 (1983).

For the reasons set forth in the report and recommendation as adopted by the court, and the order denying motions for rehearing and resentencing, docs. 1439, 1458, and 1571. Defendant is not entitled to a certificate of appealability, as he has not made a substantial showing of the denial of a constitutional right.

It is therefore ORDERED that a certificate of appealability (doc. 1582) IS DENIED and SHALL NOT ISSUE.

DONE AND ORDERED this 29th day of October 2002.

/s/ William Stafford
WILLIAM STAFFORD
SENIOR UNITED STATES DISTRICT JUDGE

Appendix D

Order Denying Petitioner's Certificate of Appealability, January 8, 2003

Appendix D

[Filed January 8, 2003]

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 02-15948-F

MARLIN DAVIS,
Petitioner-Appellant

versus

UNITED STATES OF AMERICA,
Respondent-Appellant

Appeal from the United States District Court for the Northern District of Florida

---

ORDER:

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253 (c)(2).

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

Appendix E

Order Denying Petitioner's Motion for Reconsideration, February 24, 2003

Appendix E

[Filed February 24, 2003]

IN THE UNITED STATES COURT OF APPELAS

FOR THE ELEVENTH CIRCUIT

No. 02-15948-F

MARLIN DAVIS,
Petitioner-Appellant,

versus

UNITED STATES OF AMERICA
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Florida

---

Before: DUBINA and MARCUS, Circuit Judges.

BY THE COURT:

Appellant has filed a motion for reconsideration of this Court's order dated January 8, 2003. Appellant's motion for reconsideration is denied because he has failed to make the requisite showing. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 478, 120 S.Ct. 1595, 1600-01, 146 L.Ed.2d 542 (2000).

Appendix F

Denial of Leave To File Request for
Further Review Pursuant to
Miller-El v. Cockrell, April 3, 2003

F - 1

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case and Number of Parties

April 03, 2003

William Vandercreek
9441 LBJ FWY STE 350
DALLAS TX 75243-4566

RE: 02-15948-F Marlin Davis v. USA
DC DKT NO.: 99-00522 CV-4-WS

The papers you recently submitted to this office are being returned for the reason stated.

A party may file only on motion for reconsideration with respect to the same order. Likewise, a party may not request reconsideration of an order disposing of a motion for reconsideration previously filed by that party.

Sincerely,

THOMAS K. KAHN, clerk

Reply To:
Mildred Norwood
(404) 335-6185

Encl.

PRO-1 (6-2002)